



## **Postscripts to an extraordinary Parliament and a question for colleagues**

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## Introduction

The 57<sup>th</sup> Parliament of New South Wales (NSW), which ran from 7 May 2019 to 3 March 2023, proved to be one of the most extraordinary parliamentary terms in memory. Like parliaments everywhere, this term saw the Parliament of NSW grapple with the challenge of continuing parliamentary operations in the context of the global COVID-19 pandemic and necessitated rapid innovation. The final, unexpected sitting of the 57<sup>th</sup> Parliament, four days before Christmas in 2022, with both Houses rapidly relocated to the same committee room, was in many ways a fitting end to the term.

For the Legislative Council, it was also fitting that the significant procedural reforms initiated by the non-government majority and adopted by sessional order at the start of the term, were entrenched in new Standing Orders adopted by the House and subsequently approved by the Governor in February 2023. New committees and a non-government majority increasingly assertive of its powers held the NSW Government to account in new ways right up until the very end of the term. High profile inquiries were still on foot and five reports were tabled in the week the Legislative Assembly was dissolved, after prorogation. And when it was time for the Legislative Council to elect a new Presiding Officer at the start of the 58<sup>th</sup> Parliament, there was another unprecedented procedural twist – although fortunately resolved very quickly and painlessly unlike 2021. This paper briefly explores each of these “footnotes” or “epilogues” to the extraordinary 57<sup>th</sup> Parliament.

Finally, this paper also poses a question – a request for advice and sharing of practices from other jurisdictions – the question having recurred and become a matter of renewed interest following the end of the last parliamentary term and the commencement of the new one.

## Postscripts to an extraordinary Parliament (the 57<sup>th</sup> Parliament of NSW 2019 to 2023)

### **Houses recalled when no chambers available!**

In the wake and context of the COVID-19 pandemic and all of the resulting disruptions to and rapid innovations in the Parliament of NSW, it was in some ways most appropriate that both Houses should be recalled for one final short sitting day, one month after rising at the end of scheduled sittings for the 57<sup>th</sup> Parliament.<sup>1</sup> Immediately after the two Houses rose on 17 November 2022, a major program of heritage restoration work commenced, involving both chambers being stripped bare and scaffolding being erected across the front of Parliament House in anticipation of major work on the parliamentary facade. Every day of the four months, once in every four years, election period downtime was going to be required to complete the restoration of the chambers in time for the start of the new Parliament. With both chambers therefore unavailable for the required sitting day on 21 December, we had approximately one week’s notice to find and equip a suitable alternative location.

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<sup>1</sup> The Houses were recalled to consider legislation arising from a meeting of Australian energy ministers to address and ameliorate anticipated steep rises in energy costs. For further information see the *Energy and Utilities Administration Amendment Act 2022* and *NSW Parliamentary Debates (Hansard), Legislative Council*, 21/12/2022, pp 7212-7217.

In these circumstances, it was fortunate that the Legislative Assembly had recently rapidly innovated to hold part of a sitting in a committee room when its chamber broadcasting system had failed. The procedural question of whether the Houses were obliged to sit only in their chambers had thereby been resolved and a useful precedent set. A major capital project to upgrade the audio and broadcasting technology in committee rooms, and the capacity of staff to collaborate across departments and rapidly innovate, meant that the Assembly was able to relocate and seamlessly resume the interrupted sitting within an hour.

Therefore, rather than relocating the proposed 21 December 2022 sittings of the two Houses off-site, it was decided to re-purpose the biggest committee room and to set it up as a temporary chamber for both Houses. A challenge which would have seemed insurmountable a few short years ago was handled calmly and collaboratively by the three Parliamentary departments. Procedural innovations from COVID-19 sittings were also deployed. (These included a now commonplace comprehensive conduct of business motion defining the scope of proceedings, and formalities being reported in a summary form.) All of this was possible because of, and happened against a backdrop of, a newfound 57<sup>th</sup> Parliament appreciation of what is essential for a sitting and with the benefit of all of the technological innovations put in place since the beginning of the pandemic.

### **20 new sessional orders to revamp procedures, strengthen committees and empower private members – what was the impact?**

#### **2019 sessional orders**

At the commencement of the 57<sup>th</sup> Parliament, the non-government majority in the Legislative Council proposed 20 new sessional orders designed to empower private members and strengthen the Legislative Council's ability to discharge its responsibility to hold the Executive Government to account. Each of the proposed reforms were adopted by the House. Allison Stowe's 2022 Australasian Study of Parliament Group (ASPG) paper outlines the reforms in detail.<sup>2</sup> A forthcoming paper, authored by Shaza Barber and Helen Hong,<sup>3</sup> will explore how Members of the Council utilised the new procedures during the 57<sup>th</sup> Parliament. It will include a particular focus on the way the House's power to order the production of documents and the work of committees have been utilised in tandem by Members to pursue critical issues. I will leave it to that paper to analyse the effectiveness of the sessional orders and the way in which they were used by members to hold the Executive Government to account.

#### **New Standing Orders**

Nevertheless, the Members of the Legislative Council have already cast their own judgement on the effectiveness of the new procedures. A root and branch review of the Standing and sessional orders during 2022 resulted in the House adopting a new set of Standing Orders on 17 November 2022. The new Standing Orders incorporate all the 2019 sessional orders, with minor revisions.

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<sup>2</sup> Allison Stowe (Principal Council Officer, Department of the Legislative Council), *The Shake-Up: New rules in play for the NSW Legislative Council*, 2022, accessible [here](#) on the Parliament of NSW public website, under Legislative Council, Articles on the Council.

<sup>3</sup> Respectively Acting Director, Committees, and Principal Council Officer, Committees, in the Department of the Legislative Council.

There are two final postscripts to the 2019 sessional orders and the new Standing Orders. In August 2022 I was fortunate to deliver a paper written by Velia Mignacca<sup>4</sup> at the meeting of the Society of Clerks-at-the-Table (SOCATT) in Halifax.<sup>5</sup> That paper was essentially a response to questions which had been raised, in the wake of the making and use of the 2019 sessional orders, as to the authority of the Legislative Council to make sessional orders that went beyond house-keeping matters (eg determining for the “session” the times of meeting of the House or the time for Question Time each sitting day). The paper identifies numerous precedents for significant procedural reforms being initially adopted and trialled by way of sessional order in the Legislative Council and discusses practice in other jurisdictions. The paper concludes that the House had clear authority to vary its procedures by way of sessional order in 2019, but notes that future Houses could be bound to adhere to these reforms only by the adoption of new Standing Orders.

The paper also considers two further questions. Firstly, would it be helpful for any new Standing Orders to include a new provision explicitly authorising the making of sessional orders? Secondly, is it appropriate that the NSW Legislative Council’s Standing Orders continue to require approval by the Governor of NSW, thereby theoretically opening the way for interference by the Executive Government in the reform of Legislative Council procedures if the Executive Council was to withhold a recommendation for approval?

In relation to the first question, the new Standing Orders approved in February 2023 now include a new Standing Order 3:

### 3. Sessional orders

- (1) The House may from time to time adopt sessional orders which shall have effect for the duration of the session, or temporary orders that have effect for a specific duration.
- (2) Sessional and temporary orders must relate to the operations of the House or its committees.

In relation to the second question, it is understood that the Office of the Governor of NSW has received legal advice confirming that the Governor does not require the advice of the Executive Council in order to approve the Standing Orders.<sup>6</sup> This removes the theoretical risk of Executive Government interference in parliamentary procedural matters.

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<sup>4</sup> Principal Council Officer, Department of the Legislative Council.

<sup>5</sup> *Practice makes perfect? (Or at least a little better.) Sessional orders as a vehicle for procedural reform in the New South Wales Legislative Council, 2022*, accessible [here](#) on the Parliament of NSW public website, under Legislative Council, Articles on the Council, and to be published in the forthcoming edition of *The Table*.

<sup>6</sup> This explains the delay between the adoption of the new Standing Orders by the Legislative Council on 17 November 2022 and their approval by the Governor on 20 February 2023. Although the delay was worrisome, it was worth the wait for that confirmation of the legal position.

## **New committees, an assertive non-government majority and “cabinet information”?**

### **2018 POCC Paper**

In 2018 I delivered a paper to the 49<sup>th</sup> Presiding Officers and Clerks Conference in Wellington describing the outcomes arising from the newly assertive Legislative Council in the first half of that year.<sup>7</sup> These outcomes included the establishment of five new committees (including two potentially powerful accountability focussed committees), and the success of the non-government majority in ensuring the production to the House of business cases for major capital works projects and other documents previously withheld by the Executive Government on the grounds that they were “cabinet information.” (Following the censure of the Leader of the Government and the prospect of a motion of contempt and subsequent suspension of the Leader from the House, the Government ultimately “voluntarily” produced the business cases and other documents ordered to be produced.) Given the 57<sup>th</sup> Parliament saw the non-government majority reforming procedures and acting in an even more assertive manner, as outlined above, what were the consequences of the establishment of those new committees and what developments were there in relation to orders for the production of state papers during the 57<sup>th</sup> Parliament?

### **Public Accountability Committee inquiry into the administration of government grants**

One of the two new committees, the Public Accountability Committee, was particularly active during the 57<sup>th</sup> Parliament. The Committee conducted a number of significant, high profile inquiries, including one into government grants, and another in relation to the appointment of the former Deputy Premier to a senior trade commissioner role. Both inquiries took place in the context of, and were substantially informed by, papers produced by the Executive Government in response to orders by the House.

One of the more dramatic moments for the Legislative Council during the 57<sup>th</sup> Parliament occurred just before the conclusion of the last sitting day in 2020 and involved the production to the Legislative Council of a briefing note on a \$90M grant which had been read by the then Premier.<sup>8</sup> The document had been the subject of a number of orders for papers, but had not previously been produced, with the Government asserting that no such document existed. Evidence given to the Public Accountability Committee by a staff member from the Premier’s office later acknowledged that such a document had been created but advised that it had been both shredded and deleted. The deleted document was produced to the House after being recreated by the Department of Premier and Cabinet from the Department’s “back-up tapes.” The eventual production of this document intensified what became an ongoing debate around government grants and “pork barrelling.” The first bill introduced in the Legislative Council following the March 2023 election, the Government Sector Finance Amendment (Grants) Bill 2023, seeks to enact provisions designed to ensure the integrity and transparency of government grants.

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<sup>7</sup> *Orders for papers and parliamentary committees: an update from the New South Wales Legislative Council*, 2018, accessible [here](#) on the Parliament of NSW public website, under Legislative Council, Articles on the Council.

<sup>8</sup> *Legislative Council Minutes of Proceedings*, 24/11/2020, p 1867.

### Orders for papers and “cabinet information”

The 57<sup>th</sup> Parliament saw a record number of orders for papers made and record numbers of documents produced to the Legislative Council.<sup>9</sup> This created significant burdens both for the public service and for the Department of the Legislative Council.<sup>10</sup> Notwithstanding the burden created, some of the documents produced were critically important in enabling the House to discharge its responsibilities in holding the Executive Government to account.

A small number of orders for papers were made in the 57<sup>th</sup> Parliament for the production of business cases for large capital works projects. Redacted versions of some of these business cases were eventually produced. Others were produced “voluntarily” subject to claims of “confidentiality” and hence were treated as if subject to claims of privilege and made available for inspection by members only. (Privilege was, of course, respected by MLCs as it has been since 1998). But each case (four in total over the four-year term)<sup>11</sup> took at least one year for the various steps to achieve compliance to be eventually worked through. Consequently, there was not as much movement during the 57<sup>th</sup> Parliament as might have been anticipated in relation to the powers of the House to require the production of documents notwithstanding assertions by the Executive Government that they were “cabinet information.” In relation to the business cases for major capital projects that were eventually produced, a number of those projects have since been the subject of decisions to modify, defer or cancel the projects or parts thereof. The new Government has indicated it is interested in proactive disclosure of government information and there are some suggestions that the volume of orders for papers likely to be agreed to by the House will reduce in the 58<sup>th</sup> Parliament. On 29 June 2023 the Special Minister of State, the Hon John Graham MLC, tabled a *Protocol for proactive release of government information to Members of the Legislative Council*.<sup>12</sup> It will be interesting to see what happens in this space.<sup>13</sup>

### Committees active right up until the end of the parliamentary term

With Legislative Council committees being so active and assertive throughout the 57<sup>th</sup> Parliament, it should not have been surprising that this assertiveness continued right up until the very end of the parliamentary term. This included two very political inquiries being conducted over the summer pre-election period, usually a downtime for Legislative Council committees. Both of these inquiries focussed on a different local government council. One inquiry, conducted by a government majority committee, targeted a Labor dominated

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<sup>9</sup> During the 57<sup>th</sup> Parliament a total of 456 orders for the production of state papers were agreed to by the Legislative Council, resulting in 1283 separate returns to order being received, consisting of many tens of thousands of documents, with 533 returns the subject of claims of privilege and therefore accessible to Members of the Legislative Council only.

<sup>10</sup> In response to the volume of papers produced and the administrative burdens created, as well as the challenges faced by members in navigating the volume of documents, a project to develop a system for the electronic return of documents has been underway. The project involves staff of the Department of the Legislative Council, the Department of Parliamentary Services and its IT consultants, and the Department of Premier and Cabinet, working in collaboration. The project is ongoing. For further information see Legislative Council Procedure Committee, *Operation of Standing Order 52*, November 2022.

<sup>11</sup> The four cases involved the Western Harbour Tunnel and Beaches Link project, the Parramatta Light Rail Project Stages One and Two, and Dam Infrastructure Projects (later pursued in relation to two separate projects - Wyangala Dam and Dungowan Dam).

<sup>12</sup> For further background, see the ministerial statement made by the Hon John Graham and the response by the Leader of the Opposition, *Parliamentary Debates (Hansard) for the Legislative Council*, 29/6/2023.

<sup>13</sup> To date only three orders for papers have been agreed to by the Legislative Council in the 58<sup>th</sup> Parliament.

council, the Mayor of which had been pre-selected to stand as a candidate for the Legislative Council. (The Mayor subsequently withdrew from the Legislative Council election). The other inquiry, conducted by a non-government majority committee, targeted allegations of corruption levelled against a Liberal dominated council. The latter inquiry saw committee staff, and then professional process-servers, travel around the state seeking to serve summonses upon three elusive, reluctant witnesses (including two brothers of the then Premier). These attempts were unsuccessful. The Independent Commission Against Corruption has subsequently commenced a preliminary investigation into the latter matter.

Also notable was the volume of committee work right up until the day before the Legislative Assembly expired (and the parliamentary term therefore concluded) on 3 March 2023. Following some half-hearted attempts by the Opposition to stir up controversy around the date of the prorogation and its impact on the ongoing committee inquiries, the then Premier the Hon Dominic Perrottet MP responded by publicly asserting the right of “upper house committees” to continue their work and complete their inquiries post prorogation.<sup>14</sup> The wheel had finally come full circle from the days of January 2011 when the then Premier Kristina Keneally publicly excoriated my predecessor for daring to advise that Legislative Council committees could continue with their inquiry work after prorogation.<sup>15</sup> Five committee reports were tabled in the days immediately following the prorogation of the Parliament on Monday 27 February 2023 and one committee continued to meet (in the hope of holding a public hearing if the witnesses it was seeking to summons were found) until the last possible day.

### **Election of the President**

Following the resignation of then President the Hon John Ajaka MLC mid-term in March 2021, the Legislative Council was required to elect a new President for the remainder of the term. This precipitated an unprecedented (and extremely stressful) election process which ultimately took 40 days (and 40 nights) to be resolved. I described the process in some detail in a paper delivered to the 51<sup>st</sup> Presiding Officers and Clerks Conference in Melbourne in 2022.<sup>16</sup>

It was with some trepidation that I approached the election of new President following the 2023 periodic election. What could possibly happen in the Legislative Council in 2023 to approximate the 2021 experience? Fortunately, nothing that would cause the same amount of stress as in 2021 or take more than about half an hour to resolve. Nevertheless, it was novel.

On this occasion, the new Opposition wished to protest the decision of the Government to forego the position and effectively offer it to an Opposition Member who self-nominated for

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<sup>14</sup> Joanna Panagopoulos, “Perrottet denies NSW Parliament shut down to avoid inquiries,” *The Australian*, 23/2/2023.

<sup>15</sup> For further information see T McMichael, *Prorogation and principle: The Gentrader Inquiry, Government accountability and the shutdown of parliament*, 2012, accessible on the Parliament of NSW public website, under Legislative Council, Articles on the Council.

<sup>16</sup> *Upholding and strengthening Parliament’s constitutional functions: the Election of a new President of the New South Wales Legislative Council in 2021 – A Clerk’s eye view of proceedings*, accessible on the Parliament of NSW public website, under Legislative Council, Articles on the Council.

the position (thereby depriving the Opposition of a vote in the House).<sup>17</sup> The Opposition nominated 15 members for the position, being the entire Government benches (including six ministers). The election was hastily resolved, with 15 of the 16 nominees declining the nominations. This left only one nomination and that remaining nominee, the Hon Ben Franklin MLC, was declared elected. The Opposition took a similar approach during the election of the Deputy President. After a member of the (conservative) cross-bench was nominated, the Opposition nominated three Government members and four members of The Greens. Once again, all but one nominee declined the nomination, leaving only one nomination and that remaining nominee, the Hon Rod Roberts MLC, was declared elected.

### ***A question for colleagues***

In the wake of eight valedictory speeches from retiring Members over the last 12 months, including some very moving ones, and 12 inaugural speeches over the last two months, an occasional question of clerkly protocol has arisen repeatedly.

Upon the conclusion of such speeches, it is customary for members to spontaneously rise in their places, applaud the speech, and line up to greet (usually hug) the speech maker, before the speech maker leaves the Chamber to join their family, friends and supporters. It is also one occasion on which the President never asks visiting Members of the Legislative Assembly or members of the public in the galleries to desist from applauding.

Over the years I and fellow clerks-at-the-table on duty in the House have experienced and adopted one of three different clerkly responses to inaugural and valedictory speeches:

- remaining seated until the hubbub dies down and the House moves to the next item of business (given the most popular time for inaugural and valedictory speeches is 6-6.30 pm immediately prior to the dinner break, the Leader of the Government usually suggests the President leaves the Chair until after the dinner break or moves the adjournment of the House),
- rising with the members and joining in the applause, and congratulating the speech maker after all members have done so, or
- rising but not applauding, so as to appear to be a little more detached (particularly if, as rarely occurs in such speeches, the speech maker has said something provocative or controversial), but then congratulating the speech maker after all members have done so and before the speech maker leaves the Chamber.

I have never felt entirely comfortable with any of these responses. I am very interested to understand how colleagues navigate this frequent occurrence, so as to be able to settle on a more appropriate and consistent response going forward.

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<sup>17</sup> The President of the Legislative Council not having a deliberative vote, but only a casting vote in the event of the votes being equal – section 221 *Constitution Act 1902*.